

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Case No. 2:14-cr-00178-JAD-GWF

REPORT AND RECOMMENDATION

This matter is before the Court on Defendant's Motion to Dismiss Indictments for Violation of Speedy Trial Act and Sixth Amendment that was attached to his Motion to Temporarily Suspend Local Rule 10-6(a) (ECF No. 112), filed on February 8, 2017 and filed as a separate docket entry on February 28, 2017. *See* ECF No. 123. The Government filed its Response (ECF No. 130) on March 6, 2017.

BACKGROUND

The indictment in this case charges Defendant Ian Alexander Pincombe with coercion and enticement in violation of 18 U.S.C. § 2422(b); possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B); and receipt or distribution of child pornography in violation of 18 U.S.C. 2252(a)(2) & (b)(1). *See* ECF No. 94. Defendant moves for dismissal of the indictments based on alleged violations of the Speedy Trial Act, 18 U.S.C. § 3161, and his Sixth Amendment right to a speedy trial.

Defendant was arraigned on the indictment on May 28, 2014, at which time trial was set for July 29, 2014. *See Minutes of Proceedings* (ECF No. 16). On June 25, 2014, Defendant was appointed counsel following the withdrawal of his original counsel due to a conflict of interest. *See*

1 ECF No. 20. On July 3, 2014, the parties filed their first stipulation¹ to continue the pretrial motion
2 deadlines and trial date. *See* ECF No. 21. The stipulation stated that “Defendant concurs in this
3 request for a continuance,” which was sought “to allow counsel for defendant sufficient time ...
4 within which to be able to effectively and thoroughly review the evidence..., and thereafter sufficient
5 time within which to able to effectively and thoroughly research, prepare and submit for filing
6 appropriate pre-trial motions on behalf of the client.” *Id.* at pg. 2. The Court granted the requested
7 continuance on July 7, 2014 and scheduled trial for November 4, 2014. *See* ECF No. 22. The Court
8 found that the additional time requested was excludable in computing the time within which trial
9 must commence pursuant to the Speedy Trial Act, Title 18, U.S.C. § 3161(h)(7)(A) when
10 considering the factors under § 3161(B)(I) and (iv). *Id.* at pg. 4.

11 On August 21, 2014, the parties filed their second stipulation to continue the pretrial motion
12 deadlines and trial date. *See* ECF No. 29. The stipulation stated that “Defendant concurs in this
13 request for a continuance,” and that “Defendant Pincombe needs additional time for investigation
14 and motions preparation because additional discovery was just received on August 15, 2014
15 regarding counts 2 and 3 of the indictment. Additionally, additional time is needed for the defense
16 forensic expert and private investigator to examine evidence at the Henderson Police Department...”
17 *Id.* at pg. 2. The Court granted the requested continuance on August 25, 2014 and scheduled trial
18 for December 16, 2014. ECF No. 30. The Court again found that the additional time requested was
19 excludable pursuant to the Speedy Trial Act. *Id.* at pg. 4.

20 On September 29, 2014, Defendant filed his motion to proceed pro se. ECF No. 32. The
21 Court conducted a hearing on October 6, 2014 during which the Court granted Defendant’s oral
22 request that he be appointed new counsel. *See Minutes of Proceedings* (ECF No. 34). On October
23 8, 2014, Defendant was appointed new counsel. ECF No. 36. On October 28, 2014, the parties
24 filed their third stipulation to continue the pretrial motion deadlines and trial date. *See* ECF No. 37.
25 The stipulation stated that Defendant was in custody, but did not object to the continuance and that
26

27 28 ¹ The parties labeled this stipulation as their second request, but it is actually the parties first request to
continue pretrial motions and the trial date.

1 "due to the appointment of counsel in close proximity to the current trial setting, counsel requests
2 additional time to investigate this matter and interview potential witnesses in order to effectively
3 prepare for trial." *Id.* at pg. 2. The Court granted the requested continuance on October 29, 2014
4 and scheduled trial for March 17, 2015. ECF No. 30.

5 On February 5, 2015, the parties filed their fourth stipulation to continue the pretrial motion
6 deadlines and trial date. *See* ECF No. 47. The stipulation stated that Defendant had no objection to
7 the continuance and that the parties were conducting plea negotiations. *Id.* at 2. The Court granted
8 the requested continuance on February 10, 2015 and scheduled trial for May 12, 2015. ECF No. 30.
9 On April 29, 2015, the parties filed their fifth stipulation to continue the pretrial motion deadlines
10 and trial date. *See* ECF No. 54. The stipulation stated that the parties were continuing to conduct
11 plea negotiations which were "more time consuming and more complex because in addition to the
12 plea itself, the parties have also been negotiating the language to be included in the Guilty Plea
13 Agreement." *Id.* at pg. 2. The Court granted the requested continuance on April 30, 2015 and
14 scheduled trial for July 14, 2015. ECF No. 55.

15 On June 22, 2015, the parties filed their sixth stipulation to continue trial date to allow the
16 parties to continue to conduct plea negotiations. *See* ECF No. 60. The Court granted the requested
17 continuance on June 23, 2015 and scheduled trial for August 17, 2015. ECF No. 61. On July 23,
18 2015, the parties filed their seventh stipulation to continue trial date because of the parties'
19 protracted plea negotiations. *See* ECF No. 64. On July 27, 2016, the Court granted the requested
20 continuance and scheduled trial for November 3, 2015. ECF No. 66. On October 20, 2015, the
21 parties filed their eighth stipulation to continue trial date to continue plea negotiations, which the
22 Court granted on the same day and scheduled trial for January 5, 2016. *See* ECF No. 73, 74.

23 On December 13, 2015, the parties filed their ninth stipulation to continue trial date to
24 continue plea negotiations. *See* ECF No. 80. On December 14, 2015, the Court granted the
25 requested continuance and scheduled trial for March 22, 2016. ECF No. 81. On February 24, 2016,
26 the parties filed their tenth stipulation to continue trial date and informed the Court that after review
27 of the proposed plea agreement, the plea negotiations failed and that the case would be proceeding
28 to trial. *See* ECF No. 83. On February 25, 2016, the Court granted the requested continuance and

1 scheduled trial for July 26, 2016. ECF No. 84.

2 On May 3, 2016, Defendant filed his motion to dismiss counsel. ECF No. 86. The Court
 3 conducted a hearing on June 2, 2016, during which it instructed Defendant's counsel to discuss the
 4 underlying issues regarding representation with Defendant and to subsequently file a status report.
 5 *See Minutes of Proceedings* (ECF No. 88). On June 9, 2016, Defendant's counsel filed a status
 6 report requesting withdrawal and appointment of new counsel for Defendant. ECF No. 89. On June
 7 16, 2016, Defendant was appointed new counsel. ECF No. 90. On July 5, 2016, the parties filed
 8 their eleventh stipulation to continue trial date. ECF No. 92. The stipulation stated that Defendant
 9 did not object to the continuance and requested additional time to allow counsel "to review the
 10 rather voluminous file, discuss the case with the defendant, and thereafter file any motions and be
 11 prepared for trial." *Id.* at pg. 2. The Court granted the requested continuance on July 7, 2016 and
 12 scheduled trial for October 18, 2016. ECF No. 93.

13 On September 13, 2016, the Government filed a superseding indictment. ECF No 94.
 14 Defendant was arraigned on the superseding indictment on September 22, 2016. *See Minutes of*
 15 *Proceedings* (ECF No. 97). On September 28, 2016, the parties filed their twelfth stipulation to
 16 continue motions deadlines and trial date. ECF No. 98. The stipulation stated that additional time
 17 was requested to allow the parties to settle remaining discovery issues and file any pretrial motions.
 18 *Id.* at pg. 2. The Court granted the requested continuance and scheduled trial for January 24, 2017.
 19 ECF No. 100. On December 28, 2016, the parties filed their thirteenth stipulation to continue
 20 motions deadline and trial date to allow defense counsel to confer with Defendant and determine if
 21 any pretrial motions must be filed. ECF No. 105. On December 29, 2016, the Court granted the
 22 requested continuance, set a pretrial motion briefing schedule, and scheduled trial for April 11,
 23 2017. ECF No. 106.

24 **DISCUSSION**

25 **1. Alleged Violation of Defendant's Sixth Amendment Right to a Speedy Trial.**

26 The Sixth Amendment to the United States Constitution states that "[i]n all criminal
 27 prosecutions, the accused shall enjoy the right to a speedy and public trial." The alleged violation of
 28 a defendant's Sixth Amendment right is evaluated under a balancing test which considers the

1 following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's
 2 assertion of his right to a speedy trial; and (4) the prejudice to the defendant resulting from the
 3 delay. *United States v. Alexander*, 817 F.3d 178, 1181 (9th Cir. 2016); *United States v. Gregory*,
 4 322 F.3d 1157, 1161 (9th Cir. 2003) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182,
 5 2192 (1972)). The four factors are related and must be considered together with such other
 6 circumstances as may be relevant. *Gregory*, 322 F.3d at 1161 (quoting *United States v. Tank Huu
 7 Lam*, 251 F.3d 852, 855–56 (9th Cir. 2001)).

8 The length of the delay is a threshold factor. The delay must have been sufficiently lengthy,
 9 and therefore presumptively prejudicial, to trigger examination of the other factors. *Alexander*, 817
 10 F.3d at 1181 (citing *United States v. Sears, Roebuck & Co., Inc.*, 877 F.2d 734, 739 (9th Cir.
 11 1989)). Delays approaching one year are generally considered presumptively prejudicial. *Id.* (citing
 12 *United States v. Gregory*, 322 F.3d at 1161–62). *See also United States v. Beamon*, 992 F.2d 1009,
 13 1012 (9th Cir. 1993) (citing *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 2691
 14 n. 1 (1992)). If the threshold showing is made, then the court considers the extent to which the
 15 delay exceeds the threshold point in light of the degree of diligence by the government and
 16 acquiescence by the defendant to determine whether sufficient prejudice exists to warrant relief.
 17 *Beamon*, 992 F.2d at 1012 (citing *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693–94). The delay in
 18 this case is in excess of the period of delay that gives rise to a presumption of prejudice. The Court
 19 is therefore required to consider all of the factors under the balancing test to determine whether
 20 Defendant's right to a speedy trial has been violated.

21 The second factor considers the reasons for the delay. The reason for delay is closely
 22 associated with the length of the delay. Different weights should be assigned to different reasons
 23 for delay. “A deliberate attempt to delay the trial in order to hamper the defense should be weighted
 24 heavily against the government. A more neutral reason such as negligence or overcrowded courts
 25 should be weighted less heavily, but nevertheless should be considered since the ultimate
 26 responsibility for such circumstances must rest with the government rather than with the
 27 defendant.” *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192.

28 The delay in this case is attributable to different causes. The period of delay from the

1 Court's Order granting the parties first stipulation to continue on July 7, 2014 through the trial date
2 of March 17, 2015 was due to Defendant's counsel's need for additional time to investigate and
3 prepare pretrial motions. Within this period of delay on October 8, 2014, Defendant was appointed
4 new counsel. This delay was not caused by the Government or did not result from any misconduct
5 by the Government. There is no allegation, for example, that the Government unreasonably delayed
6 providing discovery during this period.

7 The period of delay from March 17, 2015 through January 5, 2016 was due to the parties'
8 protracted plea negotiations which ultimately failed to succeed. Both parties appear to be
9 responsible for this period of delay. Neither party appears to have acted unreasonably or negligently
10 with respect to the need for continuances during this period. Upon the failure of the parties to reach
11 an agreement, they filed a stipulation to continue. The period of delay from January 5, 2016
12 through March 22, 2016 was for additional time to conduct a more thorough investigation and to
13 prepare the defense for trial. *See* ECF No. 81. The final period of delay from March 22, 2016 to
14 the current trial date of April 11, 2017 is attributable to the need for additional time for new defense
15 counsel to review discovery, investigate matters, and determine whether pretrial motions must be
16 prepared.

17 The second factor does not weigh in Defendant's favor because Defendant is primarily
18 responsible for all or most of the delay that occurred. Further, there is no showing that the
19 Government acted in bad faith or was negligent with respect to the period of delay during the
20 parties' plea negotiations. Therefore, while the overall length of the delay weighs presumptively in
21 favor of Defendant, the second factor considering the reason for delay weighs against Defendant.

22 The third *Barker* factor considers the defendant's assertion of his right to a speedy trial.
23 Whether and how a defendant asserts his right is closely related to the other factors. *Barker*, 407
24 U.S. at 531, 92 S.Ct. at 2192. "The strength of [defendant's] efforts will be affected by the length
25 of the delay, to some extent by the reason for the delay, and most particularly by the personal
26 prejudice, which is not always identifiable, that he experiences. The more serious the deprivation,
27 the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then,
28 is entitled to strong evidentiary weight in determining whether the defendant is being deprived of

1 the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove
2 that he was denied a speedy trial.” *Id.*, 407 U.S. at 531–32, 92 S.Ct. at 2192–93.

3 Defendant stipulated to all of the continuances of the trial date, which were granted by the
4 Court with the appropriate findings required by the Speedy Trial Act. These stipulations
5 affirmatively represented that Defendant did not object to the requested continuances. Defendant’s
6 first assertion of his right to a speedy trial occurred when he filed his underlying motion to dismiss
7 on February 8, 2017. The third factor, therefore, does not weigh in Defendant’s favor.

8 The fourth factor considers the actual prejudice suffered by the Defendant as a result of the
9 delay. Prejudice is assessed in light of the interests of the defendant which the speedy trial right was
10 designed to protect. The Supreme Court has identified three such interests: (1) to prevent
11 oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to
12 limit the possibility that the defense will be impaired. “Of these, the most serious is the last,
13 because the inability of a defendant to adequately prepare his case skews the fairness of the entire
14 system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also
15 prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of
16 memory however, is not always reflected in the record because what has been forgotten can rarely
17 be shown.” *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. While “incarceration in the pretrial period
18 [is] a hardship and must be included in the assessment of ‘prejudice,’ ” *United States v. Vasquez*,
19 918 F.2d 329, 338 (2d Cir.1990), it must be balanced and assessed in light of the other *Barker*
20 factors, including “length, reasons, and responsibility for the delay.” *United States v. Christian*, No.
21 209-CR-00303-JCM-LRL, 2010 WL 2326071, at *5 (D. Nev. May 3, 2010).

22 Defendant has not shown that he suffered actual prejudice through loss of witness testimony
23 or other evidence as a result of the delay in this case. Although Defendant has been incarcerated
24 and presumably experiences anxiety and concern, the length of his incarceration and any prejudice
25 present in the form of anxiety or concern does not weigh significantly in favor of finding a Sixth
26 Amendment violation. Having weighed each of the factors, the Court concludes that Defendant
27 was not deprived of his constitutional right to a speedy trial.

28 . . .

1 **2. Alleged Violation of the Speedy Trial Act.**

2 Defendant argues that his rights under the Speedy Trial Act have been violated because
 3 more than 70 days have elapsed since the indictment. *See Defendant's Motion* (ECF No. 123), pg.
 4 9. The Government argues that, taking into consideration excluded time, only 41 days have elapsed
 5 since Defendant's arraignment on May 28, 2014. *See Response* (ECF No. 130), pg. 3. The Speedy
 6 Trial Act states as follows:

7 In any case in which a plea of not guilty is entered, the trial of a defendant charged in
 8 an information or indictment with commission of an offense shall commence within
 9 seventy days from the filing date (and making public) of the information or
 indictment or from the date the defendant has appeared before a judicial officer of
 the court in which such charge is pending, whichever date last occurs.

10 Speedy Trial Act, 18 U.S.C. § 3161(c)(1).

11 The Act further provides as follows:

12 Any period of delay resulting from a continuance granted by any judge on his own
 13 motion or at the request of the defendant or his counsel or at the request of the
 14 attorney for the Government, if the judge granted such continuance on the basis of
 15 his findings that the ends of justice serve by taking such action outweigh the best
 16 interest of the public and the defendant in a speedy trial" is excludable under the
 17 Speedy Trial Act.

18 18 U.S.C. § 3161(h)(7)(A).

19 The Act, therefore, recognizes that legitimate needs of the government and of a criminal
 20 defendant may cause permissible delays. *United States v. Daychild*, 357 F.3d 1082, 1090 (9th Cir.
 21 2004). The defendant has the burden of proving that the delay meets the criteria for dismissal."
 22 *United States v. Medina*, 524 F.3d 974, 981 (9th Cir.2008); *see also* 18 U.S.C. § 3162(a)(2). The
 23 speedy trial clock starts running after either the indictment or arraignment, whichever comes last.
 24 *Daychild*, 357 F.3d at 1090.

25 Defendant's rights under the Speedy Trial Act have not been violated. The clock began to
 26 run when Defendant was arraigned on May 28, 2014. *See Minutes of Proceedings* (ECF No. 16).
 27 The clock tolled when the Court granted the parties' first stipulation to continue pretrial motions
 28 deadlines and trial date on July 7, 2014. *See* ECF No. 22. Between Defendant's arraignment and
 the entry of the first stipulation to continue trial, forty non-excludable days elapsed. In granting
 each of the requested continuances, the Court found that the ends of justice would best be served by

1 a continuance of the trial date and that the time requested was excludable under the provisions of
 2 the Act. Therefore, Defendant's rights under the Speedy Trial Act were not violated because the
 3 trial postponements were considered excluded time under the provisions the Act.

4 **CONCLUSION**

5 Based on an evaluation of the relevant factors, the pretrial delay in this case has not resulted
 6 in a violation of Defendant's Sixth Amendment right to a speedy trial or the Speedy Trial Act.
 7 Dismissal of the indictment is not warranted. Accordingly,

8 **RECOMMENDATION**

9 **IT IS RECOMMENDED** that Defendant's Motion to Dismiss Indictments for Violation of
 10 Speedy Trial Act and Sixth Amendment (ECF No. 123) be **denied**.

11 **NOTICE**

12 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
 13 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
 14 held that the courts of appeal may determine that an appeal has been waived due to the failure to file
 15 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has
 16 also held that (1) failure to file objections within the specified time and (2) failure to properly
 17 address and brief the objectionable issues waives the right to appeal the District Court's order
 18 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
 19 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

20 DATED this 14th day of March, 2017.

21 
 22 GEORGE FOLEY, JR.
 23 United States Magistrate Judge